

Castle Valley Special Service District ("Castle Valley"), North Emery Water Users Association ("NEWUA") and Huntington-Cleveland Irrigation Company ("Huntington-Cleveland") (collectively, "Appellants/Petitioners"), by and through their respective attorneys, Jeffrey W. Appel and W. Herbert McHarg of Appel & Warlaumont, and J. Craig Smith of Nielsen & Senior, respectfully submit this Joint Objection to Renewal, Appeal, and Request for Hearing of the Division of Oil, Gas and Mining

("Division") determination to approve renewal of Co-Op Mining Company's ("Co-Op") Bear Canyon Mine permit (ACT/015/025) dated August 11, 1997.

LEGAL AUTHORITY AND JURISDICTION OF THE BOARD

Appellants/Petitioners consist of a governmental entity and two non-profit corporations that provide the majority of the domestic, municipal, irrigation and industrial water to Northern Emery County. They hereby appeal a Division determination to approve the renewal of a Permit held by Co-Op Mining Company. Administrative review of a Division determination by the Board of Oil, Gas and Mining ("Board") is provided for under R645-300-211.

Persons with an interest that may be adversely affected may appeal a Division determination to this Board. Critical water sources of Appellants/Petitioners are located in the vicinity of the Bear Canyon Mine. NEWUA has developed and uses Birch Spring to provide drinking and stockwater to the unincorporated portions of Northern Emery County. Castle Valley has developed and utilizes Big Bear Springs to provide drinking water to its customers. Both Birch and Big Bear springs are in close proximity to the area being mined by Co-Op. Huntington-Cleveland holds the water rights which are utilized by Castle Valley to serve its customers and by NEWUA to serve the domestic needs of unincorporated Northern Emery County.

As water rights holders and water users of water sources in the immediate area of Co-Op's mining, the Appellants/Petitioners

have interests that have been adversely affected under R645-300-211 and R645-100-100. Furthermore, certain events have occurred, studies have been completed and information has been gathered since the Board last reversed the Division's renewal of this permit that show a hydrologic connection between the mine waters and the springs. Despite this evidence, the Division approved the renewal of Co-Op's Permit on August 11, 1997.

Appellants/Petitioners request the Board appoint an unbiased, neutral hearing examiner that is trained in hydrology, geology, and other related disciplines to conduct the hearing, to take evidence, and to recommend findings of fact and conclusions of law to the Board. The Board has authority to make such an appointment under section 40-6-10(6) of the Utah Code and R641-113-100 of the Utah Administrative Code. Certainly, under R645-300-212.100, no person who presided at the Informal Conference may preside at the Board's hearing or participate in the decision. The new evidence involved in this request for agency action requires expert consideration, and is worthy of a fresh, hard-look.

It is obvious from the unsupported and superficial findings in the Division Order that the Division did not adequately consider the new evidence presented at the Informal Conference. Instead, and despite contradictory testimony presented by Co-Op's own experts, it appears that the Division treated the "facts" as established, and essentially rubber-stamped its prior decision.

RELIEF REQUESTED

Appellants/Petitioners respectfully request this Board reverse the Division determination approving renewal of Co-Op's Permit and enforce the hydrologic requirements and environmental protection standards of the existing permit and Utah law. These requirements cannot be met until Co-Op determines its impact on the water budget, obtains more hydrologic data and resolves the disputed issues raised by Appellants/Petitioners. If the permit is ultimately renewed, at a minimum, additional terms and conditions must be included in the permit that are designed to protect the Appellants/Petitioners. This Board has authority to grant this relief under R645-303-233.110, which forbids renewal unless the terms and conditions of the existing permit are being satisfactorily met; R645-303-233.120, which forbids renewal if coal mining operations are not in compliance with the environmental protection standards in the state program; R645-301-700 et.seq., which requires adequate baseline hydrologic and geologic data, monitoring, and the protection or replacement of water rights; R645-300-133.400, which requires the Division to assess the probable cumulative impacts of mining and determine that the mining operation is designed to prevent damage to the hydrologic balance outside the permit area; and R645-301-800 et.seq., which dictates that bonds be sufficient to cover damage to water sources. These requirements were not met in the Division's Order.

ARGUMENTS AND BASIS FOR APPEAL

Appellants/Petitioners formally lodge an appeal of the Division's permit renewal decision under R645-300-211 with the Board, request a hearing and hereby incorporate herein by reference their Objections to Permit Renewal and Request for Informal Conference (exhibit A), along with Objector's Joint Post Informal Conference Memorandum and Closing Argument (exhibit B) and the entire record below including all information contained in the files of the Division. The issues raised before the Division in the Informal Conference are now ripe for Board review and action.

Appellants/Petitioners argue specifically, and without waiving any other arguments that they may raise before or information they may present to the Board, that:

1. The Appellants/Petitioners have a vested right recognized by Utah law to use the waters arising from springs located in close proximity to Co-Op's mining operations, including Big Bear Canyon and Birch Springs, for culinary and irrigation purposes. Mining has detrimentally affected and interfered with these rights and no replacement has been made or made available as required by law.

2. The Division's legal conclusion as set forth in the Order is based on admittedly obsolete facts, and is erroneous. In its Order, the Division attempted to discount the arguments of Appellants/Petitioners by construing them in some sort of metaphysical sense, rather than on the basis of well supported facts and conclusions grounded in accepted scientific methodology. Division Order at 8-9. The reality is, however, that

Appellants/Petitioners arguments that Co-Op's mine operations are hydrologically connected to the Springs are based on facts, observations, experience, and accepted scientific methods supported by real occurrences.

3. To the contrary, the Findings of Fact in the Division Order are based on unsupported statements with no reference to the record, ignore the events that establish a hydrologic connection and disregard testimony presented at the Informal Conference. The Conclusion of Law reached by the Division is erroneous, in that it overlooks the logical reasoning that a Cumulative Hydrologic Impact Assessment ("CHIA") must be inadequate if it is based on a Probable Hydrologic Consequences ("PHC") containing inaccurate and insufficient data. Furthermore, the Division made no attempt to rationally resolve the opposing theories and did not include any conditions on its approval of the permit renewal to allow for the resolution of the divergent theories of water transit in the geologic area in question.

4. The Division's statements that the baseline data, the PHC and CHIA were in existence, yet uncontested by Appellants/Petitioners, at the time of the 1991 permit renewal and appeal therefrom imply that Appellants'/Petitioners' challenge is untimely. This reasoning unravels based on assertions in the Division's Order confirming that laches can never apply to such a challenge. The Division stated that the CHIA is a "dynamic document that accommodates new information and changes as our understanding increases," and that:

the purpose of monitoring information is to test the assumptions and conclusions made at the time of permit issuance, and to decide whether mid-course adjustments in mining operations are necessary to keep the mine in compliance with its permit and the state regulatory program.

Division Order at 8.

The evidence presented at the Informal Conference established, at a minimum, the existence of a hydrologic connection between the mine and the Springs. On that basis, additional test wells, drill holes, and monitoring methodology and equipment should be emplaced to ensure protection of the water sources and compliance with state and federal law and regulation. As stated by the Division itself, the CHIA must accommodate this new information, and that entails requiring Co-Op to obtain sufficient baseline data.

5. Currently, the PHC lacks sufficient information to determine whether adjustments must be made. It is based on theories that are now outdated and preempted by new theories postulated by Co-Op's own expert. As such, the Board should consider the new information presented at the Informal Conference, and require that Co-Op obtain further hydrologic data to update and correct the PHC so that the CHIA may be modernized. Mining may not go forward until this is accomplished.

6. The informal conference held on October 17, 1996, November 8, 1996, and February 28, 1997 revealed that Co-Op is not meeting the requirements governing the hydrologic portions of the existing permit and the environmental protection standards:

a. The hydrologic information previously submitted by Co-Op as part of its permit application under R645-301-700 et

seq. is flawed and inaccurate.

b. The Probable Hydrologic Consequences ("PHC") forms the basis for the Division's assessment of the probable cumulative impacts of all anticipated coal mining and reclamation operations on the hydrologic balance and must support the Division's required determination that the operation has been designed to prevent material damage of the hydrologic balance outside the permit area. R645-300-133.400.

At the informal conference, Co-Op changed its prior position with respect to hydrologic data in the PHC, and relied on an entirely new theory postulated by Alan Mayo. The abandoned theory was that the mine was continuing to intercept many small perched aquifers. This theory formed the basis for the PHC. The Mayo theory rejects the perched aquifer concept and is premised upon the interception, by the mine, of a single broad-based sandstone channel that produces and produced the water in the mine; this theory is not addressed in the PHC.

c. The PHC describes the stratigraphic sequence as a "great thickness of discontinuous sandstone, coal, and mud/siltstone units." PHC at 2-6. The PHC also states that "[d]rainage of water from faults and fractures produces the largest volume of water flowing into the mine." PHC at 2-33.

d. At the informal conference, Richard White, another expert called by Co-Op, testified that the statement in the PHC was incorrect, stating that "the largest volume of water

flowing into the mine is from the sandstone channel." HT III. at 260. This, among other testimony and evidence presented at the Informal Conference, establishes that the hydro-geologic information upon which the permit was issued is erroneous.

7. The Division's July 20, 1994 Technical Analysis and permit revision approval incorporated the CHIA for the Gentry Mountain Area. See Division Order at 3 ¶ 2. The CHIA finding quoted in the Division's Order implies that the mine and the Springs are not hydrologically connected. Id. However, all of the experts at the hearing who testified agreed that Gentry Mountain provides the recharge for both water in the mine and the springs. HT II. at 77; 129-131. To the contrary, the Division's Order indicates no understanding of the recharge area for the water arising in the Appellants'/Petitioners' springs.

8. For the most part, the Division findings are based on "facts" for which there is no citation to the record, are contradictory to either the PHC or Co-Op's experts, and were refuted by expert testimony at the Informal Conference. In order to verify these statements, more baseline data is required, including additional test wells, drill holes and monitoring methodology.

9. The Division's conclusions in paragraph 12 of the Order are based on unsubstantiated statements. To reach these conclusions, the Division must assume among other things that (1) the Appellants'/Petitioners' water comes only from the Star Point aquifers even though the Division has no idea where the recharge

area is located; (2) Co-Op has not intercepted water destined for the Star Point aquifers or other sources; (3) the "sandstone channel" does not interrupt or dip below the Blind Canyon seam, but spills out in a "flood plain" lip over the top of the seam only; and (4) the "sandstone channel" is unconnected to other sources for Appellants'/Petitioners' recharge area. These assumptions are unsubstantiated and contradict testimony at the Informal Conference as well as admissions by Co-Op.

10. The Division provided no basis for its statements in paragraph 14 of the Order, and the conclusion reached in that paragraph ignores the possibility that the channel communicates with, and is part of the larger recharge system, or that it constitutes a separate system from past mine water events and flows.

11. In paragraph 15 of the Order, the Division stated that "Big Bear Spring's flow rate has also recovered, from a low of 76 g.p.m. in mid-1995 to 148 g.p.m. in late 1996." Division Order at 7 ¶ 15. Obviously, the Division ignored testimony that prior to mining, the Appellants/Petitioners had close to 300 gallons a minute coming from Big Bear Spring. HT I. at 30. The fact is that since mining began to intercept water, Appellants'/Petitioners' water sources have been impacted and have never fully recovered.

12. At the informal conference, for the first time and in direct contravention of its statements made at the time of renewal in 1990-1991, Co-Op admitted it pumped vast quantities of water intercepted at the working face of the mine into a worked-out

portion of the mine and elsewhere, during the 1989-1992 time period. See HT III. at 25; 217-238; 250; 292. Evidence disclosed to the Division indicated that during this same time period, anomalously high flows and water quality problems were experienced in Big Bear and Birch Springs. The import of this admission is that the mine is hydrologically connected to the springs, yet the Division ignored those facts.

13. The Division Order found that "the pumping of water out of the mine into a surface drainage above Birch Spring does not demonstrate the hydrologic connection of water in the mine to Birch Spring. . . ." Division Order at 7 ¶ 18. The Order does not address impacts to Big Bear Spring in the context of prior events demonstrating interconnection. Pumping water into the old workings contaminated that spring. See HT II. at 128, 169, 183, 221-228.

14. As was established at the Informal Conference, when the Bear Canyon Mine was first permitted and during its early years, it was virtually dry. HT III. at 8. However, Co-Op has admitted that as mining proceeded to the north, significant and continuous flows of water were encountered and continue to be encountered this day. Id.

15. Because of the hydrologic connection between the mine and the springs, these northward mining activities re-direct and contaminate water in violation of environmental protection standards.

16. The Division's Order seems to dismiss the fact that mining has affected the flows of the Springs, narrowing the focus

of effects to the Springs to the "spike" increase, attributing these to an earthquake. Division Order at 7 ¶ 17. Although it was stated at the Informal Conference that "this spiked increase here may possibly be because of the Emery County earthquake" (HT II. at 107), the Order fails to consider testimony that:

The consistent flow and then the peak flows and then the decline suggest that in a period of increasing precipitation something else is happening. We've already ruled out natural factors. The only thing that could happen is mining has intercepted flow which would normally go to Birch Springs and has diverted it somehow.

That leads to the natural conclusion that the water's going somewhere else, and the only thing that we can factor in that area is the mine. That's the only thing that's upgradient of it that could affect that.

HT II. at 107-08.

17. The statements made in paragraph 19 of the Division's Order lack merit. In February, 1994, Co-Op was assessed penalties by DOGM for failing to take adequate precautions to protect hydraulic resources at its Big Bear Mining operations. Co-Op has been cited for violations of requirements dealing with mine openings, subsidence, runoff containment, waste removal, and water monitoring. Furthermore, Mr. Tom Munson, senior reclamation hydrologist, recognized that Co-Op's actions had a potential affect on Big Bear Spring. Munson Memorandum to Pamela Grubaugh-Litig, dated May 17, 1991. Testimony at the Informal Conference also established that Co-Op's mining operations have caused contamination, diminution or interruption of Appellants'/Petitioners' state-appropriated water. Therefore,

contrary to the statement made in the Division's Order, it has not been shown that Co-Op's mining operations have been, and are now being conducted to minimize affects to Appellants'/Petitioners' state-appropriated water.

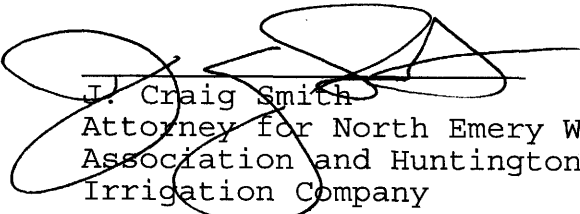
18. The PHC contains many false and inaccurate statements and lacks and adequate amount of baseline data; therefore, the CHIA fails to address the cumulative hydrologic impacts of mining. Appellants/Petitioners have addressed these issues in detail on pages 8 through 21 of Objector's Joint Post Informal Conference Memorandum and Closing Argument attached as exhibit B.

19. Co-Op's current permit does not include measures, terms and conditions adequate to protect water sources in the Bear Canyon Mine area and to remediate whatever harm to these water sources it may cause.

In summary, if this Board approves renewal of Co-Op's permit to mine (which Appellants/Petitioners request not to occur until all legal compliance has occurred), it should provide in the permit renewal for adequate maintenance, testing, exploration, protection and remediation, and must include additional terms and conditions designed to protect and provide for immediate replacement of these sources if necessary. The Board should also require that the amount of insurance, letters of credit and performance bonds be sufficient to cover the potential liability of Co-Op for damage to Appellants'/Petitioners' water sources.


Respectfully submitted this 10th day of September, 1997.

NIELSEN & SENIOR



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CERTIFICATE OF SERVICE

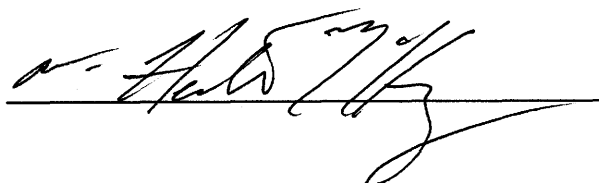
I hereby certify that on the 10th day of September, 1997, I caused a true and correct copy of the foregoing Joint Request for Agency Action to be mailed, postage pre-paid, to the following:

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A handwritten signature in dark ink, appearing to read "T. Mitchell", is written over a horizontal line.

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SECRETARY, BOARD OF
OIL, GAS & MINING

Attachment to
"Joint Objection to Renewal,
Appeal, and Request for Hearing"
dated 9/10/97.

EXHIBIT A

Docket No. 95-025

Cause No. ACT/015/025

Castle Valley Special Service District, North Emery Water Users Association and Huntington-Cleveland Irrigation Company, (collectively "Water Users") as parties adversely affected by the proposed permit renewal to mine the Bear Canyon Mine (ACT/015/025), by and through counsel, hereby submit their objections to the renewal of Co-Op Mining Company's ("Co-Op's") permit and request an informal conference.

OBJECTIONS

The grounds for objection are as follows:

1. Water Users have a vested right to use the water of springs located in close proximity to Co-Op's mining operations, including Big Bear Canyon and Birch Springs, for culinary and irrigation purposes.

2. Co-Op has failed to fully comply with the terms and conditions of its permit and the standards provided in the state program. For instance, over the past five years, Co-Op has been cited for violations of requirements dealing with mine openings, subsidence, runoff containment, waste removal, and water monitoring. Such omissions and failures endanger the water sources of Water Users.

3. Co-Op's current permit does not include measures, terms and conditions adequate to protect water sources in the Bear Canyon Mine area and to remediate whatever harm to these water sources it may cause. Renewal, if allowed by the Division of Oil, Gas and Mining, must provide for adequate maintenance, testing, exploration, protection and remediation, and must include additional terms and conditions designed to protect and provide for immediate replacement of these sources if necessary.

4. The Division of Oil, Gas and Mining has authority to require additional information under R645-303-232.250.

5. Co-Op must provide and the Division of Oil, Gas and Mining should require more specific information regarding Co-Op's mining operations, actual hydrologic consequences of mining, and in-mine activities over the past five years.

6. Water Users request an inspection of the operations with their experts and a review of all data accumulated by Co-Op, whether submitted to the Division of Oil, Gas and Mining or not.

7. The amount of insurance, letters of credit and performance bonds are insufficient to cover the potential liability of Co-Op for damage to Water Users' water supply and sources.

8. Co-Op's mining operations in the past have had, and if allowed will continue to have, hydrologic consequences outside the permit area by adversely and permanently impacting water quantity and quality flowing from Big Bear Canyon and Birch Springs.

SUMMARY OF ISSUES TO BE RAISED AT INFORMAL CONFERENCE

In addition to the issues raised above, Water Users will discuss the following issues at the conference.

1. Water Users intend to present evidence, including expert testimony, that continued mining operations will adversely impact water quantity and quality in the aquifers supporting Big Bear Canyon and Birch Springs.

2. Water Users intend to present evidence that Co-op Mining has repeatedly violated the terms and conditions of its permit and state program standards and that it has acted with disregard to Water Users' welfare.

3. Water Users intend to argue that the operations of Co-Op have had adverse hydrologic impact, have resulted in a modification of the historic water flow patterns tributary to the water sources and that they have interfered with historic flow patterns of water sources of Water Users.

4. Water Users intend to argue that the existing permit

contains inadequate safeguards to ensure protection of the water sources after mining has ceased.

5. Water Users intend to argue that pollution of water sources of the Water Users is created by the mining operations of Co-Op and that inadequate safeguards exist to prevent this.

6. Water Users intend to argue Co-Op Mining is not entitled to an automatic five-year renewal or, at a minimum, that the permit must be changed or modified, if it is granted at all.

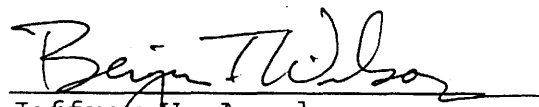
7. Water Users intend to argue that additional test wells, drill holes and monitoring methodology and equipment should be emplaced to ensure protection of the water sources and compliance with state and federal law and regulation.

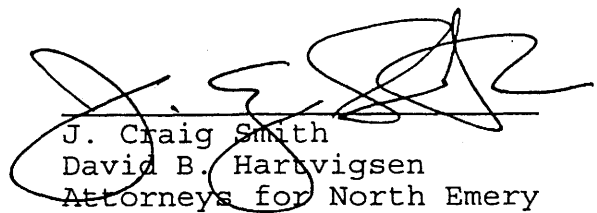
8. Water Users intend to argue that if renewal is allowed, that the permit be changed or modified to include adequate provisions for maintenance, testing, exploration, protection and remediation, and include additional terms and conditions designed to protect and provide for immediate replacement of water sources if necessary.

DATED this 12th day of October, 1995.

COLLARD, APPEL & WARLAUMONT

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SECRETARY, BOARD OF
OIL, GAS & MINING

EXHIBIT B

Attachment to "Joint Objection to
Renewal, Appeal, and Request for Hearing"
dated 9/10/97.

Docket No. 95-025

Cause No. ACT/015/025

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BEFORE THE DIVISION OF OIL, GAS, AND MINING

DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH

IN THE MATTER OF THE FIVE-YEAR)	OBJECTORS' JOINT POST
PERMIT RENEWAL,)	INFORMAL CONFERENCE
CO-OP MINING COMPANY)	MEMORANDUM AND CLOSING
BEAR CANYON MINE)	ARGUMENT
EMERY COUNTY, UTAH)	Docket No. 95-025
)	Cause No. ACT/015/025

Petitioners Huntington-Cleveland Irrigation Company, North Emery Water Users Association and Castle Valley Special Service District (collectively "Water Users"), by and through their counsel of record, respectfully submit the following Objectors' Joint Post Informal Conference Memorandum and Closing Argument.

INTRODUCTION

Renewal of mining permits such as the permit at issue is governed by R645-303-230, et seq. Of specific importance to this proceeding are R645-303-233.110 which forbids renewal unless the terms and conditions of the existing permit are being satisfactorily met, R645-303-233.120 which forbids renewal if coal mining operations are not in compliance with the environmental protection standards in the state program, R645-303-233.120 which forbids renewal if coal mining operations are not in compliance with the environmental protection standards in the state program, and R645-303-233.200 which places the burden of proof on the opponents of the renewal.

As will be discussed in detail below, the informal conference held on October 17, 1996, November 8, 1996 and February 28, 1997 revealed that the requirements governing the hydrologic portions of the existing permit are not being satisfactorily met. The same is true for the environmental protection standards. Each of these grounds and the other grounds set forth herein require that the permit of Co-op not be renewed, and mining cease until such time as these requirements can be met.

POINT I

CO-OP HAS ADMITTED THAT THE HYDROLOGIC INFORMATION UPON WHICH THE PERMIT WAS ISSUED IS ERRONEOUS

A permit to mine coal may only be issued upon submission of specific information in the form of a Permit Application. See R645-300-112.400. The Applicant is required to provide specific hydrologic information as set forth in R645-301-700, et seq. This hydrologic information submitted by the Applicant, commonly known as the Probable Hydrologic Consequences or "PHC," forms the basis for the Division's assessment of the probable

cumulative impacts of all anticipated coal mining and reclamation operations on the hydrologic balance and must support the Division's required determination that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area. R645-300-133.400.

During the informal conference, it became obvious that at best the hydrologic information previously submitted by Co-op as part of its permit application under R645-301-700, et seq. is flawed and inaccurate, thus requiring a resubmission of new and corrected hydrologic information prior to permit renewal. Further study and monitoring is required as well.

At the informal conference, Co-op changed its prior position with respect to the hydrologic data submitted as part of its permit application and upon which its permit was granted. A new theory of hydrology was enunciated by Co-op's new consultant--Alan Mayo. That theory, that the mining operation of the Bear Canyon Mine has encountered a sandstone water channel, is totally new and at variance with the hydrologic information previously submitted by Co-op as part of its permit application. The abandoned theory relied upon continuing interception of small perched aquifers, rather than interception of the potentiometric surface, which is Water User's position or an underground water conduit as postulated by Mayo at the recent hearings.

Mayo's testimony is premised on an entirely different theory of hydrogeology than the theory advanced in the PHC. The PHC describes the stratigraphic sequence as a "great thickness of discontinuous sandstone, coal, and mud/siltstone units." PHC at 2-6. In the PHC, Co-Op states:

Groundwater enters the Blind Canyon Seam of the Bear Canyon Mine through fractures and roof bolt holes. Typically, water encountered by roof bolt holes flows moderately at first. Over a period of one or two months, flow decreases and eventually stops. Sources of these short-lived flows are inferred to be localized perched aquifers which store a limited amount of water.

PHC at 2-13.

The PHC also states that "[d]rainage of water from faults and fractures produces the largest volume of water flowing into the mine." PHC at 2-33.¹ At the recent hearing, Richard White testified that this statement is incorrect, stating that "the largest volume of water flowing into the mine is from the sandstone channel." HT III. at 260. This alone establishes that the hydrogeologic information upon which the permit was issued is erroneous.

According to Mayo, the sandstone "channel" above the mine is "a broad-based channel as well as being a long channel." HT III. at 41. Under his theory, it is this "channel" that is producing all of the water in the mine. Mayo stated that it appears to him "that the Blind Canyon Fault does not transmit water, in other words, acts as a barrier for groundwater which will be in overlying rocks and likely underlying rocks associated with the coal seams. It is likely that the large fault up Bear Canyon is -- also inhibits the flow of groundwater." HT III. at 49.

This "channel" would be classified as an aquifer with water moving through it. HT III. at 89-90. Mayo's testimony indicates that this water originally moved only horizontally, but mining activity has allowed the water to flow vertically. He stated that "I don't believe that those coal seams prior to this mining activity would allow it to be moving much -- to be

¹ The Revised Hydrogeologic Evaluation went on to state that "[m]ost of the water movement in the study area is through fractures, faults, and partings between the beds." RHE at 2-14.

moving vertically." HT III. 90. The PHC did not address this theory or this particular impact of mining because "the initial hydrogeologic evaluation in the PHC did not specifically address the channel because it hadn't been encountered at the time it had been written." Testimony of Chris Hansen, HT III. at 232.

Mayo also stated he did not know whether the conclusions of the PHC conformed to his conclusions because he had not "reviewed the PHC in terms of "Is this PHC adequate?" HT III. at 94-95. His lack of contact with the prior findings and theories of Co-op led to an entirely new theory of the hydrogeology of the mine and different mine discharge numbers than those contained in the PHC or the CHIA. HT III. at 123. Therefore, his testimony, on its face, attacks the adequacy of the PHC. Of course, Objectors presented an entirely different theory, fully supported in a variety of different ways and by independent methods. Certainly Co-op must be required to resolve these disparities and fully answer all of the hydrologic and hydrogeologic questions prior to the continuation of mining. Unanswered questions and open issues do not meet the legal requirements attendant to this proceeding.

Co-op, through the submission of the expert testimony of Mayo, has admitted that the existing permit was issued upon flawed and inaccurate hydrologic information in Co-op's PHC. The Division's hydrologic assessment, which is based on the now admittedly flawed and inaccurate information, is not valid. The hydrologic terms and conditions of the permit cannot possibly be met as those terms and conditions are incorrect, flawed and do not meet the requirements of R645-303-233.110. The permit may not be renewed at this time.

POINT II

CO-OP IS INTERCEPTING AND RE-DIVERTING WATER THAT WOULD OTHERWISE PROVIDE FLOW TO OBJECTORS' SPRINGS AND THUS IS NOT COMPLYING WITH ENVIRONMENTAL PROTECTION STANDARDS

A second ground for non-renewal of the permit is the non-compliance with the environmental protection standards in the state program. In the area of hydrology, the relevant standards are to prevent material damage to the hydrologic balance outside the permit area (R645-300-133.400) and to replace any water rights that are affected in quantity or quality, (Utah Code Ann. § 40-10-18(15)(c) (1997).) As set forth below and at the informal conference, the non-compliance of Co-op with the relevant environmental protection standards was established by the Water Users.

A. The interconnection between water within the Bear Canyon Mine and Big Bear and Birch Springs was admitted.

At the informal conference an important fact was established. For the first time and in direct contravention of its statements at the time of renewal in 1990-1991, and at the significant review hearings, Co-op admitted it pumped vast quantities of water intercepted at the working face of the mine into a worked-out portion of the mine and elsewhere, during the 1989-1992 time period. See HT III. at 25; 250; 292. It was during this same time period that anomalously high flows and water quality problems were experienced in Big Bear and Birch Springs. The testimony of Charles Reynolds, Gaven Atwood and others substantiated these illegal actions. HT II. at 217-238; HT III. at 25. The import of this admission is that the hydrologic interconnection between the mine and the springs undisputably exists. In other words the water inside the mine can and does reach and feed the springs of Water Users.

B. The groundwater system through the area of the Bear Canyon Mine is connected with the Recharge on Gentry Mountain and Big Bear and Birch Springs.

Testimony at the hearing demonstrates that the Gentry Mountain groundwater system is interconnected. In his testimony, Mr. Peter Nielsen agreed that the interconnection between Birch Spring and the mine was demonstrated by the spike flow out of the spring when the mine water was being discharged out of the portals. HT II. at 129. According to Mr. Nielsen, this "shows the fractured nature of the system where you discharge out the portal into Dry Creek and you get peak flows several weeks or less than a week later in Birch Springs downgradient several thousand feet." HT II. at 130. Mr. Nielsen:

identified a trend associated with that fracture in aerial photographs and also identified that same fracture zone in subsidence associated with Trail Canyon Mine in Dry Creek. So it's an interaction of discharging water on the surface going into the subsidence and interacting with any water in Trail Canyon, some volume of water in there probably saturating the system, saturating the fault and having some sort of failure, or simply recharging the zone.

HT. II. 131. Nielsen was able to conclude that there "is no difference in the recharge location" for the water from Birch Spring, Big Bear Spring and the mine -- all are recharged from snow pack on Gentry Mountain. HT II. 77. Significantly all experts who testified agreed that Gentry Mountain provides the recharge for both water in the mine and the springs.

C. Activities in the Bear Canyon Mine which re-direct or contaminate water do not comply with Environmental Protection Standards.

With the hydrologic interconnection between the mine and the springs established, the Division must conclude that activities which re-direct or contaminate water do not comply with Environmental Protection Standards of the Division in violation of R645-303-233.120. They also damage the hydrologic balance outside the permit area in violation of R645-301-750. As

was established at the Informal Conference, when the Bear Canyon Mine was first permitted, and during its early years, it was virtually dry. HT III. at 8. However, as mining proceeded to the north, significant and continuous flows of water were encountered and continue to be encountered today. As discussed above, this encountered water is hydrologically connected with Big Bear and Birch Springs.

POINT III

THE PHC CONTAINS FALSE AND INACCURATE STATEMENTS AND LACKS AN ADEQUATE AMOUNT OF BASELINE DATA, AND THE CHIA FAILS TO ADDRESS THE CUMULATIVE HYDROLOGIC IMPACTS OF MINING

A. The PHC Contains False and Inaccurate Statements

In addition to the revision of existing hydrologic information and theory provided by Mayo, there are numerous false and inaccurate statements in the PHC which also demonstrate its inaccuracy and unreliability.

Co-op has stated that the "volume of groundwater flow into the mine has only recently increased sufficiently to produce water in excess of that needed for mine operations." PHC at 2-33. This statement is a factual misrepresentation as we know Co-Op encountered at least 110 gpm of water in the 1st North section of the mine in the summer of 1989. This fact is evidenced by pages 3-1 and 3-2 of the Hydrogeologic Evaluation of the Bear Spring Mine Permit and Proposed Expansion Areas by Earthfax Engineering, Inc. dated March 11, 1991, which states:

The East Bleeder inflow remained constant until the summer of 1989, when water was encountered at the northern end of the North Main entries. According to Wendell Owen, the mine intercepted a flow of about 110 gpm. This flow occurred mainly from fractures and roof bolt holes in the roof and has essentially remained constant since it was first encountered.

There are other documents that evidence water prior to 1991. The C.W. Mining Co. mine map dated December 1, 1989 Bear Canyon Plate 7-1A shows that Co-Op hit "Seeps/Drippers - 110 GPM" in the 1st North area on August 3, 1989 when this area was mined out. Each of Co-Op's mine maps from this time forward have shown this flow is continuing. For example, the Co-Op Mining Company Mine Water Survey Map, dated January 1, 1992 Plate 7-10A shows the 1st North area producing 120 gpm, and the 2nd East Bleeders area producing 252 gpm. Further, the Co-Op Mining Company Annual Report 1990, page A-14, shows that Station SBC-9, which is the first North area, produced flows of 120 gpm to 97 gpm during 1990.² The 1991 Annual Report states that Station SBC-9 produced from 81 to 140 gpm in 1991. This evidence clearly establishes that Co-Op hit major amounts of water in 1989.

An important question is presented as to what Co-Op did with all this water once it was encountered. According to the Co-Op Mining Company Annual Report for 1990 page A-2, the Total Water Usage for 1990 in the mine was 994,600 gallons (3.052 acre feet). This yields an average usage of 2,725 gallon per day. However, in the same report, they provided data relative to inflow in the 1st North area of the mine at a mean flow of 114.25 gpm for the year. Annual Report 1990 at A-14. The flow of 114.25 gpm is equal to 164,520 gallons per day or 60,049,800 gallons per year (184.3 acre feet). Thus, the difference between the water used and the water produced in 1990 is 59,055,200 (181 acre feet) -- where did this water go? That question, as well as where the water would have gone but for its interception must be answered before mining may continue and the lost water must be replaced.

² This 1990 report was used because DOGM either does not have, or is unable to locate a 1989 annual report.

Co-Op began reporting a discharge from the mine on their discharge permit in April of 1991. During the 606 days from August 3, 1989 when they reported encountering water in the 1st North entry until April 1, 1991, 114.25 gpm or 164,520 gallons per day were produced, yet only 2,725 gallons per day were used on average. Where did the unaccounted 161,795 gallons per day or a total of 98,047,770 gallons (301 acre feet) produced during this time period disappear to? These questions are not answered by the mine permit as it fails to account for this water. Mine Dewatering § 7.1.4.3, page 7-32.

The answers to these questions were given in Mr. Gaven Atwood's testimony. In his testimony, Atwood disclosed that this water was pumped, without a permit, out of the west portals until October of 1989, ~~which~~ the flow of North Emery's Birch Spring. HT II. at 214-224. They also "breached" a seal that was installed in the old workings and pumped water into these workings. Id. at 221.³ Pumping water into these old workings caused the icicle formation on the ledges above Big Bear Spring, and contaminated that spring.⁴ See HT II. at 128, 169, 183, 221-228.

In addressing the surge in flow and contamination of the Big Bear Spring during the fall of 1989, Co-Op argued that "[t]he reason for this fluctuation is unknown." Revised Hydrogeologic Evaluation at 2-39. However, in an interoffice memo from Tom Munson, senior reclamation hydrologist, to Pamela Grubaugh-Litig, permit supervisor, dated May 17,

³ This testimony raises issue with a statement made in the PHC that "SBC-3 was damaged in 1990 and surface water began leaking into the well. In March 1992, SBC-3 was repaired and sealed." PHC at 2-13.

⁴ Co-Op admitted during this hearing this event took place. Yet in the prior Blind Canyon Seam and in the Tank Seam hearings, they denied this and went to great lengths to try and prove that the ice formation was a common occurrence.

1991, Mr. Munson states:

It has been discovered that mine water was pumped into old workings in the south end of the mine via a pressure relief valve set up on the in-mine pumping system Based on the information the Division has received from Co-op in response to its November 27th, 1990 Division Order, and a verification that the pumping system and set-up conducted on May 16th, 1991 by Jesse Kelley, the Division has made the following observations:

Pumping water into the old workings via the old pumping and piping system most probably had an effect on the water balance in the old workings causing a discharge to occur at the outcrop, potentially affecting Big Bear Spring.

Based on the discovery of the pumping of water into the old workings and the documented increase in the flow in Big Bear Spring, the termination of pumping water into the old workings will hopefully solve the current quantity and quality abnormalities at Big Bear Spring.

(Munson Memo, 5/17/91).

Charles Reynolds admitted that during this time, "[water] was discharged into the old workings It was put into the old workings, and at the time it appeared there may be a potential, in fact the Division requested that cease and that was discontinued." HT I. at 26. Further, even though the evidence shows that Co-Op had knowledge, the PHC states that "[t]o date, no negative impacts to seeps or springs has been demonstrated." PHC 2-36. This is in addition to the material misrepresentations concerning these facts made to Dianne Nielson in the previous proceeding to secure the last renewal.

During the recent hearing, Earthfax presented flow data from Danielson on Big Bear Spring and Birch Spring in 1978, showing that the flow was only 110 gpm. HT II. 207. They used this data to attempt to argue that low flows of this magnitude were common to this spring and that the low flows during the last few years were to be expected.

It should be noted that the water years of 1977 and 1978 had the lowest ever recorded annual precipitation in that area. The preceding years were probable declining precipitation years as well. The normal trend at Big Bear Spring and Birch Spring would be for discharge to decline as well, as evidenced by Danielson's measurements from Little Bear Spring which show nearly record low values during the same time period. This suggests that the springs were dewatering aquifer storage.

It is interesting to note, however, that between 1979 to 1985 annual precipitation increased to above average and the discharge at the Springs also increased and followed the peak discharge pattern in one year. This response was not observed at Big Bear Spring and Birch Spring following the declining precipitation trend between 1985 and 1990 and the Spring has not recovered in the later years. Because Big Bear and Birch Springs have not recovered their flows in the same pattern as in 1978 through 1985,⁵ one suspects that something has changed the aquifer storage, especially since the control spring, Little Bear, has returned to normal. That something is the mining operations of Co-op.⁶

⁵ This pre-mining baseline monitoring fact should have been in the original PHC, but is not.

⁶ This is the same argument advanced by Richard White of Earthfax at the hearing when asked if he would agree with the statement made by Gregory Lines that "groundwater storage has been reduced around all water-producing mines in the area." HT III. 264. As to Bear Canyon Mine, Mr. White argued that:

the storage is basically -- it's as though you have this bathtub. And so if you take something out of the bathtub, you've reduced the storage. So anytime water is discharged from the mine, something has been removed from storage.

HT III. 264.

B. The PHC Lacks Adequate Data To Establish The Baseline From Which Hydrological Consequences Are To Be Measured

The PHC is inherently deficient because it lacks sufficient baseline data, i.e., the quantity and quality of flow of surface and ground water, so that DOGM may assess the probable cumulative impacts and produce its CHIA. It is axiomatic that if the PHC is deficient, the CHIA would be deficient, and thus would result in an invalid permit.

Section 1257(b) (Submittal contents) of Title 30 of United States Code Annotated (§ 507(b) of SMCRA), provides:

The permit application shall be submitted in a manner satisfactory to the regulatory authority and shall contain, among other things -

...
(11) a determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site, with respect to the hydrologic regime,⁷ quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the regulatory authority of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability: Provided, however, That this determination shall not be required until such time as hydrologic information on the general area prior to mining is made available from an appropriate Federal or State agency: Provided further, That the permit shall not be approved until such information is available and is incorporated into the application;

30 U.S.C.A. § 1257(b).

The history of SMCRA indicates that protection of the integrity of surface and ground-water resources from the potential adverse impacts of coal mining was one of SMCRA's major objectives. In passing SMCRA, Congress acknowledged several historical incidents in which

⁷ Hydrologic regime means the entire state of water movement in a given area. It is a function of the climate and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form, falls as precipitation, moves along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

coal mining had deprived communities downstream from mining areas of the quantity and quality of water needed to sustain those communities. As Judge Flannery said in National Wildlife Federation v. Lujan, 21 Env'tl. L. Rep. 20,125 (D.D.C. 1990),

[SMCRA] also reflects that harm to the environment can occur through accumulation of little things over a long time. At issue here is not just whether a dam will crack and burst after many years. The Act shows deep concern about changes to the quality of ground water and streams because of erosion or run-off that could take many years to come to full effect.

Id. at 20128. Therefore, in section 507(b)(11) of SMCRA, Congress required that the regulatory agency conduct "an assessment [of] the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability."

Under § 507(b)(11) of SMCRA, mining permit applicants are required to submit PHCs that focus and analyze the hydrologic effects of the mine and "adjacent areas." This has been interpreted by the Office of Surface Mining Reclamation and Enforcement, Department of the Interior, ("OSMRE"), and upheld by the courts⁸ to require a "life-of-the-permit" analysis. On the other hand, a CHIA, which is the regulatory agency's duty, requires a more extensive "life-of-the-mine" analysis.

Under 30 C.F.R. § 784.14(e)(2) and R645-301-731.800 the PHC must provide "baseline hydrologic data," i.e., the quantity and quality of flow of surface and ground water. Furthermore, under § 507(b)(11) of SMCRA, the application must include sufficient data so

⁸ National Wildlife Federation v. Lujan, 21 Env'tl. L. Rep. 20,125 (D.D.C. 1990).

that DOGM may assess the probable cumulative impacts and produce its CHIA.⁹ "This information [baseline data] must be gathered and evaluated by the applicant to a degree that will reasonably assure the protection of the onsite and offsite environment and water rights of others in areas where adverse impacts may occur." 47 Fed. Reg. 27,712, 27,715 (June 25, 1982). The Utah Administrative Code also requires the permit application to include a plan that is specific to the local hydrologic conditions, contain steps to minimize disturbance to the hydrologic balance inside the permit area, prevent material damage outside the permit area, and includes "measures to be taken to protect or replace water rights and restore approximate premining recharge capacity." R645-301-731.

Without providing an in-depth review of the entire PHC, it is clear the baseline data of the PHC is insufficient. For example, Table 2-5 on page 2-10 of the PHC indicates that SBC-4 (Big Bear Spring) and SBC-5 (Birch Spring) were "not measured" between 1984 and 1991.¹⁰ EarthFax's Figure 2-2 also does not show the geologic strata below the Mancos No. 1 formation in well DH-4, nor does it show any water in the Storrs formation from that well. Also, the PHC is not entirely clear how many samples were used by EarthFax to arrive at the figures it uses in most of its tables. For example, Tables 2-6 and 2-9 indicate that 8 quantity

⁹ The legislative history of SMCRA shows that the Senate added to § 507(b)(11) a requirement that the CHIA not be required until adequate hydrologic information was available on the general area and that the House responded with a proviso that the permit could not be approved until such information was available and incorporated into the permit. 53 Fed. Reg. 36,394, 36,396 (Sept. 19, 1988).

¹⁰ Despite the Board's ruling in the Tank Seam proceeding that it was "convinced" that Co-Op's failure to measure flow rates at the inception of mining was "harmless," requisite baseline data needed to be more than reliance on Water User's records. Co-Op should have done studies to establish baseline data themselves.

and quality tests were made for Big Bear and Birch Springs in 1991. These tables indicate that a different number of samples were taken from the other monitoring sites and many of the tables do not indicate the number of samples taken in order to come up with the numbers.

The installation of the groundwater monitoring wells inside the mine, after they intercepted the large flows in 1989 does not constitute baseline data required under 30 C.F.R. § 784.14(e)(2), especially since that law was enacted before Co-Op started mining in the Bear Canyon Seam. The aquifers above and below that portion of the mine were likely dewatered before the groundwater monitoring wells were installed in the mine.

Further, the testimony of Gaven Atwood demonstrates some of the samples used may not represent actual water flow/quality conditions.¹¹ Atwood personally witnessed many instances where oil and grease got into the mine water, including a time when they blew a main and within two minutes it poured out 250 gallons of oil. HT II. 225. He also testified that mine workers would urinate and defecate inside the mine.¹² Despite these facts, the PHC neither included an analysis of the water quality impacts of fecal coliform, nor a plan to deal with spontaneous high volume discharges of hydrocarbons. PHC at 2-37. The end result was the contamination of Water User's springs by mine operations.

The point is that in order to gauge the probable and cumulative impacts of future mining in an area, an adequate baseline study must be and was required to be performed.

¹¹ Atwood testified that on the second day he worked at the mine, he was told to take a water sample for DOGM. Atwood collected the sample of "really good drinking water" from a drip in the roof, although the sample was supposed to come from the well that sits outside the discharge point. HT II. at 228.

¹² The fact that approximately sixty people per day work in the mine indicates much fecal coliform is produced.

Because insufficient data was collected and arrayed, Co-Op must be required to provide more information on the hydrology of the mine area:

When existing wells are not sufficient in number or location to provide an accurate description of baseline conditions, §§ 780.21(b)(2) and 784.14(b)(2) would allow the regulatory authority to require drilling of new or additional monitoring wells and to require that necessary additional information be provided.

47 Fed. Reg. 27,712, 27,715 (June 25, 1982). Additional monitoring wells for more extensive monitoring would also provide the DOGM with an "early warning system," which may meet some of Water User's concerns. Also, groundwater monitoring is usually based on the baseline data. To the extent that baseline information is inadequate, ongoing monitoring should be more extensive to make up for the inadequate baseline information.

C. The CHIA Fails To Adequately Address The Cumulative Hydrologic Impact Of Mining On Water Availability To The Areas Within Which Impacts From The Mining May Occur

Because the PHC did not include the quantum of information about the hydrogeology of the area necessary for the DOGM to prepare the CHIA, a permit cannot be approved until adequate information is available and incorporated into the permit. See footnote 9. If this information is not available:

then the regulatory authority must delay issuance of the permit until either the necessary information is available for an appropriate federal or state agency or is collected and incorporated into the permit application by the applicant.

53 Fed. Reg. 36,394, 36,398 (Sept. 19, 1988). Thus, if the information available regarding the hydrology of the mine area is insufficient for the CHIA, the applicant must provide that data. Because the Co-Op PHC did not contain this information, the CHIA analysis was inadequate and mining must cease.

1. The CHIA erroneously excludes an assessment of impacts of mining on the availability of water in the service areas of Water Users.

The CHIA is required to assess the impacts in the "cumulative impact area" ("CIA"). The CHIA gives an exhaustive, 2-page inventory of the indigenous plant species within the currently-defined Gentry Mountain CIA, yet ignores the human populations who rely on the water coming from that area. CHIA, I. Introduction.

Section 701.5 of 30 C.F.R. defines, "cumulative impact area" to mean the area "within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface and ground-water systems." This, coupled with the § 507(b)(11) requirement that the CHIA assess "water availability" leads to the conclusion that the service areas of Water Users should be included in the CIA. However, the current "southern and eastern boundaries [of the Gentry Mountain CIA] are defined by T16S/T17S and R8E/R9E SLBM, respectively." CHIA, II. Cumulative Impact Area. This covers an area of approximately 112 square miles.¹³ This CIA eliminates an assessment of the hydrologic impacts of mining and water availability on the downstream communities of Huntington and Cleveland. By excluding these areas, the CHIA fails to meet the purpose of § 507(b)(11) that the CHIA assess hydrologic impacts, "particularly upon water availability."

¹³ The preamble to the rule proposing the definition of the CIA states, "the cumulative impact area would be defined to mean, with respect to assessment of the probable cumulative hydrologic impacts of mining, the surface and ground-water basin(s), . . . which may have a cumulative hydrologic impact with the proposed operation. . . . The precise areal extent of the cumulative impact area would be defined, on a permit-by-permit basis" 47 Fed. Reg. 27,712, 27,714 (June 25, 1982).

2. The CHIA inadequately addresses hydrologic impacts of mining on the availability of water to the service areas of Water Users.

Because the CIA excludes the service area of Water Users, the CHIA is rendered inadequate. Under 30 C.F.R. § 784.14(f), the CHIA is required to be sufficient to determine the probable cumulative impact to the hydrologic balance outside the permit area, i.e., the service areas. As a review of the CHIA indicates, no analysis of water availability has been done for these areas.

It may not be argued that water availability of downstream users is not affected by mining in the Gentry Mountain area. The five mines listed in the CHIA--Bear Canyon, Deer Creek Mine Waste Rock Storage Facility, Hiawatha Mines Complex, Star Point Mines, and Trail Canyon Mines--all "consume" groundwater that would eventually make its way, one way or another, to those downstream communities. The CHIA's assessments of impacts of mining on water availability is very sparse. In this regard, the Gentry Mountain CHIA merely concludes, "approximately 630 gpm are consumptively lost to mine ventilation (80 gpm) and evaporation at coal preparation facilities (545 gpm)" and "An upper limit of 20 years has been estimated for complete flooding of workings and re-establishment of the premining ground water system." CHIA, VI. Summary. The CIA and CHIA must be completed per the requirements of law before mining may continue.¹⁴

3. An inadequate CHIA raises the question of whether the permit has been legally issued or renewed.

The inadequacies of the CHIA make a comparison of PHCs on proposed mining

¹⁴ As all of Huntington Creek is still appropriated water, this water must be replaced pursuant to § 40-10-18(15)(c).

operations with the CHIA inadequate as well. In defending the PHC and CHIA requirements to the district court, the Secretary of the Interior argued in National Wildlife Federation v. Lujan, 21 Env'tl. L. Rep. 20,125 (D.D.C. 1990), that:

[A]t its option, the operator may submit additional data to assist the regulatory authority in drawing up the CHIA. Implicit in this suggestion is the view that the operator almost has to submit such data, because if the regulatory authority cannot put together a CHIA, it may not issue a permit. See SMCRA s 507(b)(11), 30 U.S.C.A. s 1257(b)(11) (CHIA not required until hydrologic information made available by federal or state agency, but permit shall not be approved until information available and incorporated into the application) (See NWF v. Hodel, 839 F.2d at 758, construing statute in this manner.)

Under this analysis, the original permit and the current permit renewal should not have been granted until there was sufficient information on water availability and hydrology to prepare and incorporate into the CHIA. As is discussed above, DOGM must review the PHC with a revision of the CHIA and the areal extent of the CIA in mind.

4. The CHIA's findings are inadequate.

Finally, the CHIA's findings are inadequate. Under 30 C.F.R. § 784.14(f), and R645-301-729.100 "[t]he CHIA shall be sufficient to determine, for purposes of permit approval, whether the proposed operation[s] [have] been designed to prevent material damage to the hydrologic balance outside the permit area." In this regard, the CHIA simply concludes: "[t]he designs proposed for all anticipated mining operations within the CIA are herein determined to be consistent with preventing damage to the hydrologic balance outside the proposed mine plain areas." CHIA, VI. Summary. This is merely an inadequate, misstatement of the applicable standard for a CHIA. Thus, DOGM must re-visit its Gentry Mountain CHIA and CIA for the purposes of bringing it into compliance with § 507(b)(11) of SMCRA. As part of that process, the CIA must be enlarged beyond its current border of T16S/T17S and

R8E/R9E SLBM to include the areas served by Water Users.

POINT IV.

The arguments below address the issues requested by the Division in its March 25, 1997 letter.

A. UNDER R645-301-750 CO-OP IS REQUIRED TO EITHER AMEND ITS PLAN OF OPERATIONS OR MAKE REPARATIONS FOR DAMAGES CAUSED IF IT CAN BE DEMONSTRATED THAT THE MINING HAS ANY HYDROLOGIC EFFECT

The performance standards of R645-301-750 provide:

All coal mining and reclamation operations will be conducted to minimize disturbance to the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area . . .

R645-301-750 does not address the quantity of effect that must be demonstrated to require an operator to amend its plan or make reparations. The omission of language concerning amount or level of disturbance is evidence that the amount of hydrologic effect is not an issue. Further, there are many other provisions in the rules that imply the intent was to mandate this requirement where any hydrologic effect can be shown. Of course, in this case any water diverted in a manner that reduces Water Users vested water rights is a material impairment and damage. The fact is that hundreds of acre feet are missing.

For example, R645-301-731 states that the "plan will specifically address any potential adverse hydrologic consequences identified in the PHC determination prepared under R645-301-728 and will include preventative and remedial measures." Further, R645-300-148 states that the permittee will provide "[a]ny new information needed to correct or update the

information previously submitted to the Division by the permittee under R645-301-112.300."¹⁵ R645-300-148.100. This implies that if any new hydrologic effect is demonstrated it must be addressed by the PHC, even if there is only a potential effect. Of course here we have actual effects.

The Water Users have demonstrated at this hearing and Co-Op admitted, that there was a surge in quantity and decrease in quality of the spring water during the time that Co-Op pumped water into the old workings. That means the mine workings are interconnected with the Springs and are intercepting Spring recharge water. It is undisputed that Water Users springs have not recovered their historic flows and the testimony and exhibits introduced support that conclusion. Thus, the injury is actual, material and continuing, and the Division must minimize this disturbance and prevent any further damage.

B. THE DIVISION MAY ORDER WATER REPLACEMENT AS A REMEDY THAT IS CURRENTLY AVAILABLE AND CO-OP IS REQUIRED TO REPLACE WATER IT CONTAMINATED, DIMINISHED, AND/OR INTERRUPTED

1. The Division May Order Water Replacement As A Remedy That Is Currently Available

Even though the Board has not yet promulgated underground water replacement rules under the recently enacted amendments to the Utah Coal Regulatory Program, as an administrative matter, an order of water replacement is a remedy currently available to the Division. The Surface Mining Control and Reclamation Act of 1977 gives primary responsibility for developing, authorizing, issuing, and enforcing regulations rested with the

¹⁵ This provision applies to instances where cessation has been ordered and is presented here only to illustrate intent.

states. 30 U.S.C. § 1201(f). State laws and regulations must be consistent with, and at least as stringent as, federal law or else the state risks federal intervention, withdrawal of program approval, and loss of primacy. 30 U.S.C. §§ 1211, 1253, and 1255. Congress revised SMCRA (Public Law 95-87) in section 2504 of the Energy Policy Act of 1992 by adding section 720 (1309a). Pub.L. 102-486, 106 Stat. 2776 (1992). Section 1309a of SMCRA requires underground mining operations to:

promptly replace any drinking, domestic, or residential water supply of a well or spring in existence prior to the application for a surface coal mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations.

30 U.S.C. § 1309a(a)(2). The Office of Surface Mining Reclamation and Enforcement promulgated a final rule implementing section 1309a and adding "Probable-Hydrologic-Consequence" and water replacement requirements to 30 C.F.R. §§ 701.5, 784.14, and 817.41. 60 Fed. Reg. 16722 (March 31, 1995).

Since 1979, Utah has required that:

The operator of a surface coal mine shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where this supply has been affected by contamination, diminution, or interruption proximately resulting from the surface coal mine operation.

Utah Code Ann. § 40-10-29(2) (1979). The 1997 amendments expand this requirement to underground mining to coincide with and abide by federal law. Further, Rule R645-301-731.800 of the Utah Administrative Code mirrors the language of the Utah Code. Even Mr. Hansen, counsel for Co-Op, acknowledged before Chairman Lauriski that the requirement to replace water is:

nothing new, it's written into the current regulations. R645-301-731 requires Co-Op's plan to include measures to be taken to protect or replace water rights and . . . [a]lso require Co-Op mine to replace any water that's contaminated or lost.

Transcript of Hearing on Tank Seam, 10/25/94 at 26.

Co-Op cannot now argue that replacement is not required. For replacement to be a viable option, however, a source must be identified and be available before interruption occurs. That is not the case now and is an issue that must be resolved before the permit may be renewed.

2. CO-OP Is Required To Replace The Water That It Contaminated, Diminished, And Interrupted

Co-Op is required to replace any water that has been contaminated, diminished or interrupted -- regardless of the quantity affected. Utah Code Annotated Section 40-10-18(15) provides:

(c) Subject to the provisions of Section 40-10-29, the permittee shall promptly replace any state-appropriated water in existence prior to the application for a surface coal mining reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations.

Utah Code Ann. § 40-10-18(15) (1997).

The rule of *de minimus non curat lex* has no application to this determination. That rule is reserved for circumstances where the harm caused, the potential that the harm will occur, or the injury suffered by the occurrence would be so minor that the law need not be concerned. Utah courts recognize, and strongly protect the rights of water owners. This is illustrated by the Utah Supreme Court's disapproval of the statement made in a State Engineer's decision that there could be a "de minimus" decrease of the water reaching the lower users "with which the

courts will not be concerned." Piute Reservoir & Irrigation Co. v. West Panguitch Irr. & Reservoir Co., 367 P.2d 855 (Utah 1962) (holding that a change should not be allowed to operate without affirmative proof that the rights of the lower water users were not thereby impaired). Furthermore, Utah has adopted a strict liability standard for interference with water. Morgan v. Quailbrook Condominium Company, 704 P.2d 573 (Utah 1985) (instruction on interference with water properly phrased in terms of strict liability citing water scarcity rationale of Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)).

In this case, the Water Users are the owners and purveyors of the water rights in Birch Spring and Big Bear Spring. These springs are major drinking water sources for Northern Emery County. Evidence adduced at the hearings revealed that Co-Op's mining operations have affected these springs through loss of hundreds of acre feet. The actions of Co-Op have destroyed the historic return flow patterns and consume groundwater which would have eventually made its way to Water User's springs. Without replacement water, the Water Users' ability to provide a safe and consistent water supply to their constituents is severely threatened. Thus, rule of de minimus non curat lex does not apply, and Co-Op should be strictly liable for any contamination, diminution or interruption of the Water Users' springs under the mandates of R645-301-727. They should be ordered to replace the water they have intercepted.

Where the "de minimus" rule does not apply, the amount of impact is irrelevant. However, even if the Division finds that the rule could apply to cases involving such an important resource, it would not apply in this case. The impact on the Springs occurring simultaneously with Co-Op's discharge of excess mine water into the old workings (the

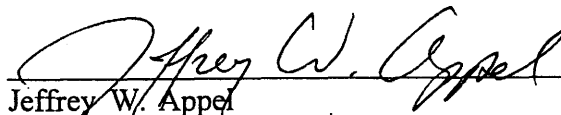
"event") was extensive and continuing, and its significance is great. The current flows from the springs are a reduction of hundreds of acre feet from the historical flows. Furthermore, Water Users submit that another significance of the "event" was that it established that there is in fact a relationship between the activities occurring in the mine and the quantity and quality of water at their springs. Certainly the continuing potential for an impact of unknown magnitude cannot be considered de minimus.

CONCLUSION

The informal conference has uncovered the flawed and inaccurate nature of the PHC, CHIA and CIA, which is the hydrologic information upon which the Permit is based. It has also demonstrated the material misrepresentations upon which the previous permit renewal was based. Co-op must not be allowed to profit from such behavior. Finally, the need for immediate replacement of water and the need for identification of future replacement sources has been amply demonstrated.

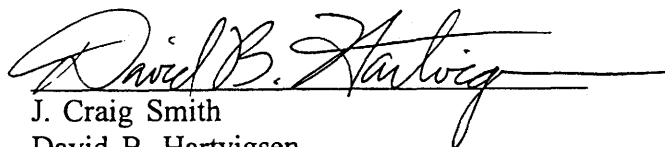
Dated this 8th day of May, 1997.

APPEL & WARLAUMONT



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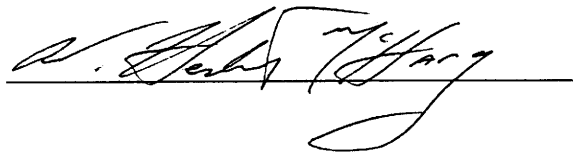


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Association and Huntington-Cleveland Irrigation
Company

CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of May, 1997, I have caused to be sent, through the United States mail, first-class, postage prepaid, a true and correct copy of the foregoing OBJECTORS' JOINT POST-INFORMAL MEMORANDUM addressed as follows:

F. Mark Hansen, Esq.
624 North 300 West, Suite 200
Salt Lake City, UT 84103

A handwritten signature in cursive script, appearing to read "F. Mark Hansen", is written over a horizontal line.